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On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia - Where Is the Piracy; What Are the Legal Ramifications

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On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia - Where Is the Piracy; What Are the Legal Ramifications

Cover Page Footnote

International Law; Commercial Law; Law

**On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia—
Where is the Piracy? What are the Legal Ramifications?**

Barry Hart Dubner† & Claudia Pastorius††

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I. Introduction: A Scenario

You are part of a four-man private security team contracted to protect a merchant vessel against piracy off the Somali coast, spanning 1800 miles.¹ You see what appears to be a “pirate” vessel. In this case, it is not a skiff. Most acts of piracy are perpetrated using fishing skiffs that are modified to attack

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¹ Robert I. Rotberg, *Combating Maritime Piracy: A Policy Brief with Recommendations for Action*, WORLD PEACE FOUND. (WPF), Policy Brief #11, at 2 (Jan. 26, 2011).

merchant vessels.² Rather, you think it is a “mother” vessel that is ready to unload a couple of skiffs with the purpose of attacking your ship. You alert the rest of your security team, but not the Master of the ship. You open fire and destroy the ship; you kill the “pirates” on board and go to check on your success—only to find that it was a legitimate fishing vessel. The question is—are you legally responsible for the deaths of the persons on board and the destruction of the fishing vessel and cargo? If so, what national laws govern jurisdiction? Far fetched? Not at all.

This Article introduces the reader to the state of piracy off the coast of Somalia with a brief history of the Somali situation. The purpose of the Article is to examine the international rules, national laws, industry guidelines, and current practices regarding the engagement of private armed security guards on board merchant ships. The Article also considers other counter-piracy measures, such as the risk assessment procedures and other guidance on the matter set forth by the International Maritime Organization (IMO).³ The Article analyzes a sample contract issued by the Baltic and International Maritime Council (BIMCO)⁴ for private armed guards and merchant vessels that illustrates how the parties manage their legal obligations.⁵ The Article considers the applicability of the Montreux Document⁶ to the human rights concerns implicated in using private armed security guards on merchant ships.⁷ Furthermore, the Article notes that the great reduction in piracy activity and the lower success rate of pirate attacks have likely prompted the financiers bankrolling the pirates to stop funding them.⁸

² Barry Hart Dubner & Ritvik Raturi, *On the Economics of International Sea Piracy—A Case of History Repeating Itself*, 20 MICH. ST. INT'L. L. REV. 745, 750 (2012).

³ The IMO is a specialized agency of the United Nations charged with addressing safety and security in the shipping industry. *Introduction to IMO*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/About/>.

⁴ BIMCO is a major shipping industry association that aims to facilitate commercial shipping operations for its global membership. *About BIMCO*, BIMCO.ORG, https://www.bimco.org/About/About_BIMCO.aspx.

⁵ See *infra* Part IV.

⁶ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations and Private Military and Security Companies During Armed Conflict, U.N. DOC A/63/467 (Aug. 9, 2009).

⁷ See *infra* Part V.

⁸ For more information, see Professor Dubner's article on the economics of

II. Putting the State of Piracy off the Coast of Somalia into Perspective

One of the authors was privileged to be invited to a three-day conference at the Harvard Kennedy School on combating maritime piracy off the coast of Somalia.⁹ Specifically, the meeting was called in order to brainstorm about the situation off the coast of Somalia.¹⁰ The participants included former ambassadors, naval captains, academic scholars, members of the intelligence community, and representatives from the Department of State and Joint Chiefs of Staff.¹¹ The main discussion concerned how to combat acts of piracy.¹² At that time, in 2009, there had been 217 ships attacked by pirates: More than “22,000 ships passed through the Gulf of Aden alone, and others traversed the wider waters of the Indian Ocean with 47 successful hijackings.”¹³ More than \$60 million was collected in ransoms during 2009.¹⁴ This was an increase from 2008 when “only 111 ships were attacked, up from

piracy, which includes a discussion of the “pyramid scheme” in piracy financing and how financial backers or “enablers” benefit exponentially more than the pirates performing the necessary tasks for the piracy attacks at sea. Dubner & Raturi, *supra* note 2, at 754. Stakeholders in Somali counter-piracy efforts have also recently been invited to consider, “What is required to finally and conclusively break the back of the piracy business model?” *The Economic Cost of Somali Piracy 2012*, in OCEANS BEYOND PIRACY, at v (2013) (with data audited by the Baltic and International Maritime Council (BIMCO)), available at http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_1.pdf [hereinafter *The Economic Cost of Somali Piracy 2012*]. See also Anja Shortland, “Robin Hook”: *The Developmental Effects of Somali Piracy*, German Inst. for Econ. Research, DIW Berlin, Discussion Paper No. 1155, 2 (2011), available at <http://ssrn.com/abstract=1940271>.

⁹ Dubner & Raturi, *supra* note 2, at 745.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Rotberg, *supra* note 1, at 1. See also Carlos Lopes, *Africa Needs Structural Transformation Not Structural Adjustment*, EXEC. SECRETARY BLOG, UNITED NATIONS (UN) ECON. COMM’N FOR AFRICA (April 30, 2013), <http://www.uneca.org/es-blog/africa-needs-structural-transformation-not-structural-adjustment#.Ug0bN2RVS3B> (reporting that “[t]here were about 29 piracy attacks in 2009 off the coast of Somalia as compared to 150 attacks in the Strait of Malacca in 2005[.]” and also noting the difference between the perceptions regarding stability and economic growth potential between African and Asian coastal States).

¹⁴ Rotberg, *supra* note 1, at 1. See also *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 3.

approximately 50 in 2007.”¹⁵ In 2008, of the attempted hijackings, 32 were successful.¹⁶ “Fifty-five million dollars was delivered to the pirates for ransom in 2008.”¹⁷

The sums paid for ransom alone are a fraction of the true costs of piracy.¹⁸ The Oceans Beyond Piracy (OBP) organization¹⁹ notes that its ransom calculations include not only the monetary sums paid directly to the pirates, but also the associated logistical costs such as damages to the vessels, the cost of delivering the ransom, and the labor costs of negotiators and attorneys.²⁰ However, OBP further explains that because of the difficulty of gauging the accuracy of the secondary, or intangible, costs of piracy, they are not included in the statistics.²¹ Significant intangible consequences of piracy that should be considered are the loss of human life, the financial and psychological effects on the victims and their families,²² the commercial costs for the time a ship is out of service during capture,²³ the impact of piracy on the well-being of the people of Somalia, the consequences for the economic development of the region, and the effects on the international maritime industry.²⁴

¹⁵ Rotberg, *supra* note 1, at 1.

¹⁶ *Id.*

¹⁷ *Id.* In 2010 and 2011, the reported ransoms paid grew exponentially to \$176 million and \$159.62 million, respectively; in 2012, the ransoms paid dropped drastically to \$31.75 million—the possible reasons will be discussed *infra*. See *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 11.

¹⁸ “[P]iracy is not a purely economic phenomenon, and human costs abound.” *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 11.

¹⁹ OBP is a non-profit devoted to finding a solution to the piracy problem with the involvement of stakeholders from the maritime community. *About Us*, OCEANSBEYONDPIRACY.COM, <http://oceansbeyondpiracy.org/about>.

²⁰ *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 3 (“In addition to the ransom payment itself, the logistical costs associated with paying ransoms . . . were estimated at 100% of the value of the ransoms themselves, bringing the total cost attributable to the payment of ransoms and recovery of vessels to \$63.5 million in 2012.”).

²¹ *Id.* at 8-9.

²² *Id.* at 12.

²³ In 2011, the average time it took to negotiate a ransom payment and the release of a ship was 178 days. *Id.* at 11. In 2012, the amount paid for ransoms decreased but the average number of days the ships were held increased to 312 days. *Id.*

²⁴ OBP notes that it is important to consider “the impact of Somali piracy on the Somali people. It should not be forgotten that they are some of the biggest victims of the

The 2009 conference participants realized that action would need to be taken to combat the Somali piracy problem and its far-reaching effects.²⁵ Developing solutions was challenging because the coastlines along the Greater Horn of Africa and Yemen total 5,510 miles.²⁶ Only Yemen and Kenya, at that time, had maritime patrol capability.²⁷ Therefore, it was necessary to have countries on those coastlines cooperate to form a naval force that would counter the piracy patrols in this vast area.²⁸ At the time, Task Force 150²⁹ was responsible for combating sea-borne terrorism efforts in the Red Sea, the Gulf of Aden, and the Gulf of Oman.³⁰

The question on everybody's mind at the conference was how to combat pirates.³¹ Naturally, the first thought was to discourage piracy on land.³² Aside from following the money that was funding the pirates, suggestions by private security firms concerned how to make ships harder to capture.³³ It was agreed that reasonable force should be used to combat pirate attacks.³⁴ One resulting recommendation of the conference was that

lawlessness occurring off of Somalia's shores." *Id.* at 2. Trade-related impacts include the loss of revenue at the Somali ports, increased costs correlated to price inflation, stunting of the activities of law-abiding Somali fishers, and loss of tourism revenue due to the perceived risk of harm in Somalia. *Id.*

²⁵ Rotberg, *supra* note 1, at 3, 8-10.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ As mentioned in the introduction, the Somali coast alone is 1800 miles long, requiring significant collaboration and resources to effectively patrol. *Id.* at 2.

²⁹ Combined Task Force 150 is one of three task forces operated by Combined Maritime Forces, a multi-national naval partnership. *See About Us*, COMBINED MARITIME FORCES, <http://combinedmaritimeforces.com/about/>.

³⁰ Rotberg, *supra* note 1, at 2. Collaboration among national navies to combat piracy continues. *See About Us*, COMBINED MARITIME FORCES, *supra* note 29. One Chinese general visiting a multinational Singapore-led ship in the Gulf of Aden said, "We share a common purpose – to defeat piracy and ensure the security of international shipping. We also recognise the benefits of coordinating our efforts to achieve greater effectiveness[.]" *CTF 151 and Chinese Navy Cooperate in Counter-piracy Operations in Gulf of Aden*, COMBINED MARITIME FORCES (May 27, 2013), <http://combinedmaritimeforces.com/2013/05/27/ctf-151-and-chinese-navy-cooperate-in-counter-piracy-operations-in-gulf-of-aden/>.

³¹ Rotberg, *supra* note 1, at 3.

³² *See id.* at 4.

³³ *See id.* at 8.

³⁴ *Id.*

Flag states (or, if necessary, the ship owners or operators), should issue rules for the use of force and escalation of force policies. In that context properly trained sharpshooters, under the direction of the ship's master and with clear rules for the use of force, should be authorized to shoot when menacing skiffs approach within 300-400 yards of a target vessel and present an imminent threat to a vessel or its crew. Those sharpshooters should be prepared to continue firing, if necessary.³⁵

In addition, some less forceful deterrence techniques were recommended, like forming defensive water curtains with high pressure hoses or "hardening" the ships with greased hulls, barbed wire barriers, and high-voltage fences.³⁶

The legal suggestions included harmonizing U.N. Security Council and state rules in countries around the Red Sea, the Gulf of Aden, the Arabian Sea, and Indian Ocean, so that their rules would be consistent regarding the use of weapons and the ability to bring weapons aboard merchant ships at the ports.³⁷ It was thought that if weapons were going to be available aboard vessels at sea to deter pirates, those ships would need the legal right to keep those arms while in a refueling or discharge harbor.³⁸

It was suggested that unifying the laws could help to update the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation³⁹ and also expand the

³⁵ *Id.* at 9. Rotberg notes that not every conference participant agreed with all of the recommendations. *Id.* at 4, n. 2.

³⁶ *Id.* at 9. Other less violent solutions, advocated by the International Chamber of Shipping (ICS) include water cannons (sweeping in an arc across the hull), using ballast pumps to flood the deck to create a water curtain, using blasts of hot steam, and spraying anti-traction foam (that does not use up the ship's fire-fighting stock). *Best Management Practices for Protection Against Somali Piracy*, ICS/ISF, Ver. 4, at 33-34 (Aug. 2011), available at http://eunavfor.eu/wp-content/uploads/2013/01/bmp4-low-res_sept_5_2011.pdf [hereinafter *Best Management Practices for Protection Against Somali Piracy*]. Even more creative and less violent technology has been developed to fill the demand in the counter-piracy market; consider: air cannons that shoot projectile nets to "trap" vessels, extremely foul smelling sticky "skunk" curtains, and anti-pirate laser distraction systems. Neil Ungerleider, *Water Cannons! Lasers! Sonic Weapons! Fighting Somali Pirates With Science*, FAST COMPANY (Dec. 29, 2011), <http://www.fastcompany.com/1804176/water-cannons-lasers-sonic-weapons-fighting-somali-pirates-science>.

³⁷ Rotberg, *supra* note 1, at 11.

³⁸ *Id.*

³⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222

Djibouti Code of Conduct Concerning the Suppression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden.⁴⁰ Consistency in the national and international laws to permit the use of weapons at sea and the presence of the weapons in the ports would support the private anti-piracy measures by merchant vessels.⁴¹ Updating these treaties would “strengthen international legal codes concerning and permitting the prosecution of pirates and pirate financiers.”⁴²

According to the International Maritime Bureau (IMB),⁴³ since 2009 piracy on the world’s costliest seas has reached a five-year low, “with 297 ships attacked in 2012, compared to 439 in 2011. The worldwide figures were brought down by a huge reduction in Somali piracy, though East and West Africa remain the worst hit areas, with 150 attacks in 2012.”⁴⁴ The IMB attributes this drop not only to the combined naval forces that are deterring piracy off Africa’s East coast by using pre-emptive strikes and robust action against mother ships, but also to the presence of private armed security teams and the application of the Best Management Practices (BMP).⁴⁵ In addition to the decline in piracy due to naval efforts and private armed security, the IMB suggested that the “hardening” of vessels by responsible operators also contributed to this drop in sea piracy.⁴⁶

⁴⁰ Rotberg, *supra* note 1, at 11; Djibouti Code of Conduct Concerning the Suppression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, Apr. 3, 2009, Int’l Mar. Org. Doc. C102/14.

⁴¹ See Rotberg, *supra* note 1, at 8-9.

⁴² *Id.* Another proposal involved changing the rules to allow confiscating boats clearly equipped for piracy. See *id.* at 2-11. It was suggested that specialized equipment like grappling hooks, rocket-propelled grenade launchers, machine guns, etc., could be considered prima facie evidence of “piratical intent,” which would create a legal ground to confiscate the ships. *Id.* at 11.

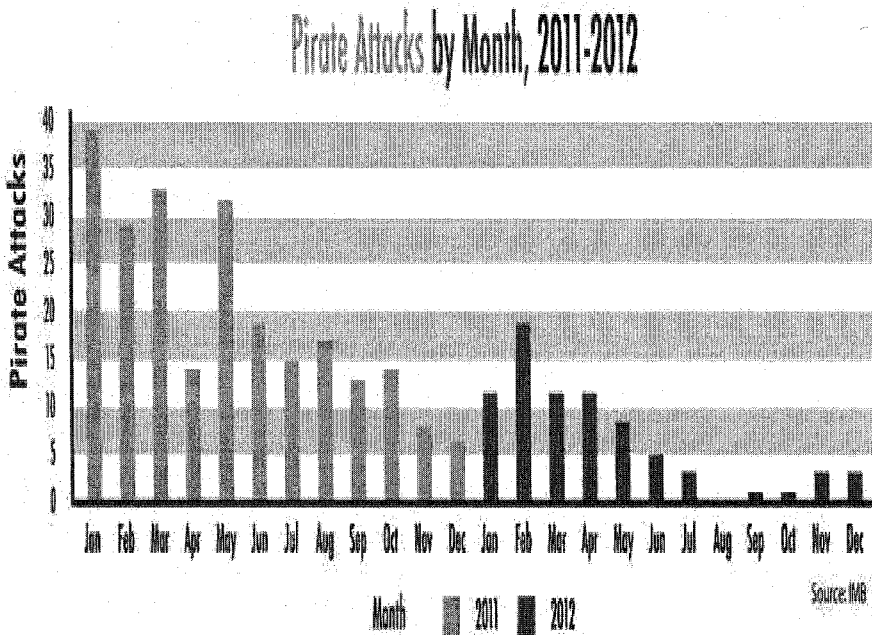
⁴³ The IMB is a division of the International Chamber of Commerce that has the goal of combating maritime crime and malpractice. *Internal Maritime Bureau*, ICC COMMERCIAL CRIME SERVICES, <http://www.icc-ccs.org/icc/imb>.

⁴⁴ Int’l Chamber of Commerce [ICC], Int’l Mar. Bureau [IMB], *Piracy and Armed Robbery Against Ships, Report for the Period Jan. 1 - Dec. 31, 2012*, at 24 (Jan. 2013) [hereinafter *IMB Piracy Report 2012*].

⁴⁵ *Id.* The BMP-4 is endorsed by international shipping industry coalitions and international military forces. See *Best Management Practices for Protection Against Somali Piracy*, *supra* note 36, at 72-85.

⁴⁶ *IMB Piracy Report 2012*, *supra* note 44, at 34.

However, even with all this optimism, the IMB points out that Somali pirates were still holding 127 crew members through the end of 2012.⁴⁷ “Forty-four of the crew members have been held by different Somali pirate factions for over two years.”⁴⁸ The IMB Piracy Reporting Center recorded a total of sixty-six incidents worldwide of piracy and armed robbery against ships in the first three months of 2013, which is notably less than the corresponding period in 2012, when 102 incidents were reported.⁴⁹ Nonetheless, in the first quarter of 2013, four vessels were hijacked, fifty-one boarded, and seven fired upon; there were four attempted attacks, seventy-five crew members were taken hostage, fourteen were kidnapped, and one was killed.⁵⁰ See the chart below by the IMB that graphically compares piracy attacks off the coast of Somalia in 2011 and 2012.⁵¹



⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Int'l Chamber of Commerce [ICC], Int'l Mar. Bureau [IMB], *Piracy and Armed Robbery Against Ships, Report for the Period Jan. 1—March 31, 2013*, at 22 (Apr. 2013) [hereinafter *IMB Piracy Report 2013*].

⁵⁰ *Id.*

⁵¹ *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 7.

Only five of these incidents were recorded in Somalia for this quarter, including the hijacking of a fishing vessel and its twenty-member crew, who were freed by naval forces before reaching Somalia.⁵² There were two vessels fired on in the Indian Ocean and two attempted attacks against Aframax sized tankers in the Gulf of Aden.⁵³ In the first quarter of 2013, Somali pirates continued to hold five vessels with sixty crew-members on board; in addition, seventeen members were being held captive on land.⁵⁴

Why the sudden drop in the acts of piracy off of Somalia? The IMB refers to the amount as “significantly” reduced.⁵⁵ The IMB explains that

[t]he drop in reported attacks is due to proactive naval actions against suspect Pirate Action Groups, the employment of privately contracted armed security personnel and the preventative measures used by the merchant vessels (as per latest Best Management Practices recommendations). The attacks will rise to past levels if the naval presence is reduced or vessels relax their vigilance.⁵⁶

The IMB’s cautiously optimistic reports emphasize that, “[t]he threat of Somali piracy remains very present” and illustrates this reality with reports of piracy like an attack near Mogadishu in 2013, which was successfully thwarted by the target ship and naval forces.⁵⁷

Acts of piracy off the Somali coast have thus dropped to the point where they seem to be under control.⁵⁸ There are a myriad of reasons for this result.⁵⁹ However, it has to be something more than a coincidence that the drop in numbers has occurred since merchant ship owners have taken to hiring private security teams

⁵² *IMB Piracy Report 2013 supra*, note 49, at 22.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *IMB Advises Continued Vigilance as Maritime Piracy Attacks Decline*, ICC COMMERCIAL CRIME SERVICES (Apr. 15, 2013), <http://www.icc-ccs.org/news/841-imb-advises-continued-vigilance-as-maritime-piracy-attacks-decline>.

⁵⁶ *See id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *See IMB Piracy Report 2013 supra*, note 49, at 22.

to protect their ships in passage.⁶⁰

In order to enable the highest degree of protection from piracy, these security teams need arms on the vessels.⁶¹ For example, the Queen Mary II, one of the world's most recognizable ocean liners, passes through the Red Sea, the Indian Ocean, and out towards Dubai.⁶² Even though the ship passes through these dangerous regions, the risk of pirates attacking or succeeding in an attack on the Queen Mary II is minimal because of the ship's counter-piracy measures.⁶³ It carries 2,500 passengers and 1,300 crew from South Hampton to Dubai on the first leg of a world cruise.⁶⁴ The ship itself is 345 meters long and fourteen stories high, and its promenade deck is seven floors above the sea.⁶⁵ It is fast, hard to board, and on this type of passage, is moderately well armed and carries armed private contractors when it passes through high-risk areas.⁶⁶ To keep the counter-piracy measures in place *and* comply with State laws at ports, ships resort to "creative workarounds."⁶⁷ For example, on certain routes ships may have to pick up the armed contractors from one State and leave them in another State and/or strategically "drop" their weapons overboard.⁶⁸

Armed security contractors "routinely carry M-16 type assault rifles and sometimes belt-fed machine guns, often picked up from ships acting as *floating offshore armories* near Djibouti and Sri Lanka."⁶⁹ What is behind the drop in Somali piracy is a matter of debate, because the navies patrolling the Indian Ocean assert that they finally have things under control.⁷⁰

Sailing through the Internationally Registered Transit Corridor,

⁶⁰ *See id.*

⁶¹ *See* Rotberg, *supra* note 1, at 9.

⁶² Peter Apps, *Have Hired Guns Finally Scuppered Somali Pirates?*, REUTERS (Feb. 10, 2013), <http://www.reuters.com/article/2013/02/10/us-somalia-piracy-idUSBRE91902J20130210>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ David Isenberg, *The Rise of Private Maritime Security Companies*, SOMALIAREPORT (May 26, 2012), <http://www.somaliareport.com/index.php/post/3380>.

⁶⁸ *Id.*

⁶⁹ Apps, *supra* note 62 (emphasis added).

⁷⁰ *Id.*

as you'll see, a protected route between Somalia and Yemen, the QM2 passed warships from the United States, France, India and Australia. . . .

As well as the [European Union] force, there are separate flotillas from NATO and US-led coalition forces that often include Asian vessels. Several other nations, including China and Russia also keep ships there, running convoys through the "high-risk zone."⁷¹

However, many remain dubious that this explains the fall in the numbers of attempted piracy, or success rates in addition to that.⁷² A more reasonable explanation seems to be that the use of armed guards has become commonplace, particularly for merchant ships passing through high-risk areas.⁷³ *Not one ship with armed guards has been taken by pirates.*⁷⁴

On the other hand, piracy specialists and naval officers believe that hired guards are too quick to pull the trigger, and have even fired on innocent fishers from India, Oman, and Yemen.⁷⁵ For instance, in February 2012, two Indian fishers were killed by Italian security guards, who mistook their fishing vessel for a pirate ship.⁷⁶ The incident was blamed on the pirates operating off the coast of Somalia, which caused security guards to be aboard the vessels.⁷⁷ The deaths of the innocent fishermen were a materialization of the "worst fears" of those opposed to armed security guards on ships.⁷⁸ One British safety advocacy group commented:

We have been warning for some time about the dangers linked

⁷¹ *Id.*

⁷² See *Protecting Ships from Somali Pirates—The Navy vs. Private Security*, FORBES (Mar. 11, 2013), <http://www.forbes.com/sites/gcaptain/2013/03/11/protecting-ships-from-somali-pirates-the-navy-vs-private-security/> (describing a security guard company owner noticing that his clients needed more education about the support and services offered by the naval forces).

⁷³ See *id.*

⁷⁴ *Id.* (emphasis added).

⁷⁵ Muneza Naqvi, *India, Italy Wrangle over Indian Fishermen Killing*, CNSNEWS (Feb. 22, 2012), <http://cnsnews.com/news/article/india-italy-wrangle-over-indian-fishermen-killing#sthash.mNSENwHA.dpuf>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *id.*

with the use of armed guards on commercial vessels. The vast majority of armed guards protecting commercial vessels are extremely well trained and highly professional; but there can be no room for human error when lethal force is used⁷⁹

III. Significant Shifts in the International Guidance and National Laws

Before the IMO and various states became involved with the legal issues of employing armed guards on merchant ships, there were no existing standards or international guidance upon which private maritime security companies (PMSC) could rely.⁸⁰ Article 92 of the United Nations Convention on the Law of the Sea⁸¹ (UNCLOS) gives each flag State “exclusive jurisdiction on the high seas.”⁸² Article 94 of UNCLOS refers to “duties of the flag State.”⁸³ It is within the prerogative of Flag States to allow privately contracted armed security personnel (PCASP) on board ships and there are various laws that govern when Flag States so decide.⁸⁴ The competent State authorities that may exercise jurisdiction over PCASP in varying circumstances include the Flag States, the countries where the PCASP are registered, the countries in which operations are conducted or managed, and the countries where the PCASP may transit.⁸⁵

The national laws regarding the use of PCASP are not consistent and some nations still prohibit their presence on

⁷⁹ *Id.* Additionally, there was a great disagreement about the security guards being tried for murder in India, since the ship was in international waters with an Italian flag. *Id.*

⁸⁰ International Maritime Organization [IMO], *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area*, MSC.1/Circ.1443, May 25, 2012, Annex [hereinafter IMO Interim Guidance for PCASP].

⁸¹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁸² *Id.* art. 92.

⁸³ *Id.* art. 94.

⁸⁴ International Chamber of Shipping [ICS] & European Community Shipowner's Associations [ECSA], *Comparison of Flag State Laws on Armed Guards and Arms on Board* (June 2012), available at <http://www.ics-shipping.org/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf> [hereinafter *ICS Flag State Laws 2012*].

⁸⁵ See IMO Interim Guidance for PCASP, *supra* note 80, Annex, at 1.

merchant ships.⁸⁶ An article published on September 17, 2012, by Captain Rich Madden, for example, indicated that there are many countries threatening criminal and civil penalties for carrying weapons on board merchant vessels for self-defense.⁸⁷ These restrictions persist, despite the fact that Somali piracy off the Horn of Africa has been “at least temporarily suppressed largely through the use of armed security teams.”⁸⁸ So, the first problem in connection with conducting operations on merchant vessels through various territorial waters is—how do you get the arms on board the ships? In other words, what laws are involved in connection with arming the ships?

The first option Captain Madden discusses concerns the time when vessels approach the high-risk area.⁸⁹ What happens is that the PCASP fly out, join the vessel, and break out weapons stored on board.⁹⁰ The problem with “this tactic of having weapons on-board the vessel at all times, regardless of where the ship is operating,” is that ships potentially run afoul of local authorities’ regulations.⁹¹ The second option that has gained some traction is the use of floating armories.⁹² In this case, a vessel such as a converted oil field supply boat is stationed in the Red Sea, Straits of Hormuz, or south of Mozambique, to provide passing vessels’ security teams their weapons.⁹³ What does this avoid? It eliminates the “issues involved with merchant vessels arriving in the port with weapons aboard.”⁹⁴

⁸⁶ See Rich Madden, *The Armed Security Response to Piracy, and Some of the Hassles*, GCAPTAIN (Sept. 17, 2012), <http://gcaptain.com/armed-security-response-piracy/>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Professor Dubner has previously recommended that a floating ship could try pirates. Barry Hart Dubner, *Human Rights and Environmental Disaster—Two Problems That Defy the “Norms” of the International Law of Sea Piracy*, 23 SYRACUSE J. INT’L L. & COM. 1, 41 (1997); Barry Hart Dubner & Sara Fredrickson, *On the Legal Issues Regarding the Prosecution of Sea Pirates (Including Human Rights): A Case of History Repeating Itself?* 26 TEMP. INT’L & COMP. L.J. 233, 252 (2012).

⁹³ See Madden, *supra* note 86.

⁹⁴ *Id.*

What type of issues are involved? Certain countries have implemented regulations and/or procedures for dealing with weapons entering in their ports. Captain Madden details the following State regulations:

- Egypt: Currently illegal to have weapons on-board while transiting coastal waters or Suez Canal. In order to transit Suez Canal, the offload of weapons and land transport to the other end of the canal is required.
- India: Weapons and ammunition must be secured in a locked weapon safe when entering Indian territorial (12 nm offshore) waters. Vessels transiting the Indian EEZ (200 nm offshore) and carrying armed security must make reports to Indian Coast Guard and Navy. In either case, a complete declaration of security personnel and weapons must be made within 96 hours of entering Indian EEZ.
- Yemen: Substantial "fee" normally paid by shipping agent to Yemeni Coast Guard.
- Kenya: Weapons required to be removed from vessel and stored in armory ashore during port stay.
- South Africa: 96 hours (4 days) notice required. Numerous ship masters have been detained and charged under the Fire Arms Control Act. Previously, 21 days' notice had been required prior to arrival when carrying weapons for self-defense.
- Venezuela: As per U.S. Coast Guard, "*Vessels planning to enter Venezuelan ports and carrying security weapons, are advised to ensure proper registration and confirmation from the appropriate Venezuelan Customs authorities prior to entry, and to heed any concerns regarding their carriage by country agents.*"⁹⁵

Weapons and ammunition must be declared to customs officials.⁹⁶ If the master does not do so, he risks criminal charges and severe penalties.⁹⁷ Therefore, Captain Madden suggests that regulations and security procedures are essential for any deck officer sailing in high-risk waters.⁹⁸

The rules for the use of force by armed guards on merchant ships are also those that are applicable under national law.⁹⁹ The shipowners believe that the guidelines set for the rules of force

⁹⁵ *Id* (emphasis in original).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See IMO Interim Guidance for PCASP, *supra* note 80, at Annex 1 ("According to the United Nations Convention on the Law of the Sea (UNCLOS) (part II, section I, article 2) and customary international law, a coastal State has sovereignty in its territorial sea.").

should reflect the rights under most national laws for individuals “to use reasonable force to prevent serious crime and their own personal self-defence.”¹⁰⁰ This raises the question of whose national law the ship must follow: is it the flag of the ship? If so, the laws of the flag states differ radically – from the heavily regulated to the unregulated.¹⁰¹ Obviously, countries that issue the most “flags of convenience” have an open registry or have very little regulation, or they would not be used by shipowners.¹⁰²

Bulgaria and many other countries have absolutely no regulations regarding the use of private security forces on board merchant ships.¹⁰³ On the other end of the spectrum, Japan prohibits weapons and security personnel on board ships pursuant to the national laws forbidding the possession of firearms and swords.¹⁰⁴ In July 2011, the International Chamber of Shipping (ICS) examination of Flag State rules revealed that in Belgium, it was not per se forbidden by the Belgian laws or Belgian Criminal Code to have private security personnel or weapons on board, also noting that political discussions on the issue were underway.¹⁰⁵ In February 2013, Belgium established rules to expressly permit the presence of arms and security guards on board merchant vessels, with requirements for vessel registration and for reporting piracy and counter-piracy activity.¹⁰⁶ In addition to Belgium, the ICS

¹⁰⁰ Baltic and International Maritime Council [BIMCO], *Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel*, at 1-3 (March 2012) [hereinafter *BIMCO Guidance on RUF 2012*].

¹⁰¹ See ICS & ECSA, *Summary of Flag State Rules on Arms and Private Armed Guards on Vessels* (July 2011), available at <http://www.ukpandi.com/fileadmin/uploads/ukpi/Documents/Piracy/privatearmedguardsflagstateregs.pdf> (charts with Flag State RUF) [hereinafter *ICS Flag State Laws 2011*].

¹⁰² See INT’L TRANSP. WORKERS FED’N, *What are Flags of Convenience?*, <http://www.itfglobal.org/flags-convenience/sub-page.cfm>.

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also *ICS Flag State Laws 2012*, *supra* note 84 (noting that the Japanese Shipping Association has requested that the government “place public armed guards such as the Self Defense Force and the Japan Coast Guard on board Japanese flagged vessels”).

¹⁰⁵ Compare *ICS Flag State Laws 2012*, *supra* note 84, with *ICS Flag State Laws 2011*, *supra* note 101.

¹⁰⁶ AMBOS NBGO, *Law Concerning the Combating of Maritime Piracy*, AMBOSLAW (Feb. 1, 2013), <http://www.amboslaw.be/en/news/law-concerning-combating-maritime-piracy> (noting that the new Belgian rules are temporary and will be

notes that the following countries have changed their laws, regulations, and/or policy to permit the use of PCASP: Cyprus, Denmark, Greece, France, and the United Kingdom (modifying policy recommendation from strongly advising against PCASP, to recommending their use in the High Risk Area).¹⁰⁷ The regulatory changes in these countries not only allow the use of PMSC, but also formalize licensing and registration, set durational limits, impose PCASP experience and expertise requirements, define the status of the security guards as crew or “supernumeraries,”¹⁰⁸ and require detailed reporting of PMSC.¹⁰⁹ The ICS has appropriately warned stakeholders that the national “rules and regulations are subject to change at short notice.”¹¹⁰

IV. Important Legal Issues Raised When Employing Security Guards Aboard Ships

In order to see how the rules of force issued as guidance by the IMO have impacted the shipping industry, BIMCO issued a sample contract of employment for security guards on merchant vessels.¹¹¹ The contract points out that it is important to comply with Flag State law as well as any applicable local laws.¹¹² The key issues that this contract addresses include standards to which PMSC must conform in terms of providing adequate insurance to cover their liabilities and contractual indemnities (which members should verify), such as having in place the necessary permits and license system to allow them to lawfully transport and carry weapons, liability and indemnity provisions based on “knock for knock” mutual allocation of risk principles, and, finally, the Master’s responsibility for the safe navigation and overall

re-evaluated in December of 2014); *see also Insight: Piracy—Gulf Of Aden And Indian Ocean*, SKULD (Nov. 2013), <http://www.skuld.com/topics/voyage—port-risks/piracy/overall/piracy1/armed-guards/> [hereinafter *Piracy—Gulf Of Aden And Indian Ocean*].

¹⁰⁷ *See Piracy—Gulf Of Aden And Indian Ocean*, *supra* note 106.

¹⁰⁸ *See infra* note 113 (regarding provisions in the GUARDCON model contract for PCASP).

¹⁰⁹ Baltic and International Maritime Council [BIMCO], *GUARDCON Standard Contract for the Employment of Security Guards on Vessels*, at 3 (March 2012) [hereinafter *GUARDCON Standard Contract*].

¹¹⁰ *See ICS Flag State Laws 2011*, *supra* note 101 (noting this at the end of chart).

¹¹¹ *GUARDCON Standard Contract*, *supra* note 109.

¹¹² *Id.*

command of the vessel.¹¹³

The GUARDCON contract is accompanied by a separate guidance document entitled “Guidance on the Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV).”¹¹⁴ It is aimed at assisting Members with respect to establishing agreements on the rules for the use of force that must form part of any contract for the employment of PMSCs.¹¹⁵ Members of Shipowners’ Protection and Indemnity Association should note, however, that they are also required to exercise due diligence in following the rules for the use of force by complying with the IMO/MSC Circular 1405,¹¹⁶ in addition to the Best Management Practices, Flag State, and applicable national laws.¹¹⁷

The guidance on the rules for the use of force issued by BIMCO for use by privately contracted armed security personnel (PCASP) in defense of a merchant vessel set up guidelines for a graduated response by armed security guards to any actual, counter, perceived, or threatened act of piracy and/or violent robbery and/or capture/seizure by third parties in order to the protect the crew and defend the vessel from being hijacked.¹¹⁸ The

¹¹³ *Id.* The contract also includes provisions as to permits and licensing, investigations and claims (e.g., where a shipping vessel has been damaged or destroyed because of security measures), insurance policies (i.e., the minimum insurance coverage that the contractors have to maintain in order to cover their liabilities during a contract), the main methods of employing security guards, and the payment fees, expenses, and currency of choice. *Id.* at 8-12. The total cost of security guards and equipment for counter-piracy measures was estimated to be between \$1.65 billion and \$2.06 billion in 2012. *The Economic Cost of Somali Piracy 2012*, *supra* note 17, at 18. For detailed cost comparisons of insurance, security guard payroll, and equipment see *id.* at 31-34 (estimating war risk insurance costs to industry to be over \$365 million dollars).

¹¹⁴ *BIMCO Guidance on RUF 2012*, *supra* note 100.

¹¹⁵ *See id.*

¹¹⁶ IMO, *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, Annex 1, MSC.1/Circ.1405/Rev.2 (May 25, 2012), available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/MS-C.1-Circ.1405-Rev2.pdf> [hereinafter IMO Circular 1405].

¹¹⁷ *BIMCO GUARDCON Contract for the Employment of Security Guards on Vessels*, SHIPOWNERS PROTECTION LIMITED (March 2012), <http://www.shipownersclub.com/media/377127/bimcoguardconcontractfortheemploymentofsecurityguardsonvesselsmarch2012.pdf>.

¹¹⁸ *BIMCO Guidance on RUF 2012*, *supra* note 100, at 1.

risk assessment by the shipowners is not to be used as an alternative to the implementation of the current BMP.¹¹⁹ The most important item is again that only reasonable and proportionate force shall be used.¹²⁰ That should be the level of response by PCASP.¹²¹

It appears that the rules for the use of force follow the guidance on graduated and proportional use of force that are given both by the IMO and the principles set forth in the guidance statement for BIMCO.¹²² The force used must be necessary and proportional.¹²³ There must be a respect for human dignity and human rights of all persons.¹²⁴ That means that non-violent and humane means should be applied first.¹²⁵ Examples of non-violent measures that BIMCO's guidance recommends are maintaining a physical and visible presence on the upper deck and bridge wings to deter potential attackers; using visual warnings like flares, lasers, and written banners; emitting sounds created by hailers or long-range acoustic signaling devices; and, finally, showing intent to use force by first using passive measures such as hoses or releasing objects like nets and logs to hinder approaches of skiffs while showing PCASP weapons and expressing the intent to use them.¹²⁶ The cost of non-violent (or, less aggressive) methods for the protection of merchant vessels is displayed in the OBP's chart displayed below.¹²⁷

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ *Id.* at 2.

¹²⁴ *BIMCO Guidance on RUF 2012*, *supra* note 100, at 3.

¹²⁵ *Id.*

¹²⁶ *Id.* at 3.

¹²⁷ *Oceans Beyond Piracy*, *supra* note 19, at 18.

SECURITY						
Type of Equipment	Unit Cost per Ship	Units per Year	Rate of Use (Low)	Rate of Use (High)	Total Cost (Low)	Total Cost (High)
Razor Wire	\$7,998.00	2.00	80%	80%	\$447,888,000.00	\$447,888,000.00
Water Cannons	\$118,755.00	.20	.25%	.83%	\$2,078,212.50	\$6,927,375.00
Electrified Barriers	\$39,585.00	.33	.75%	2.5%	\$3,463,687.50	\$11,545,625.00
Warning Signs	\$4.50	1.00	80%	80%	\$126,000.00	\$126,000.00
Acoustic Devices	\$21,000.00	.20	5%	15%	\$7,350,000.00	\$22,050,000.00
Sandbags	\$1,424.16	1.00	80%	80%	\$39,876,480.00	\$39,876,480.00
TOTAL					\$500,782,380.00	\$528,413,480.00

BIMCO even provides guidance for the types of fire to be used, such as firing warning shots first, then trying disabling fire, or when all other means fail, using deliberate direct fire against the attackers.¹²⁸ There is a discussion in the guidance document about the use of legal force and that of opening fire on a person:

(g) Use of Lethal Force and Opening Fire at a Person

(i) Lethal force should be used only as a last resort and in accordance with the principles referred to in Paragraph 5 above. The circumstances where lethal force in self-defence can be used will vary. Such circumstances may include an armed attack of an MV where the attackers are, for example:

(1) Firing directly at the MV or persons on board in circumstances where the attackers have failed to heed warning shots or other deterrent measures (assuming there was sufficient time for such measures).

(2) Preparing to fire or firing at the vessel whilst clearly demonstrating an intention to close with vessel in an attempt to board, by positioning very close or alongside and preparing climbing ladders for that purpose.

(3) Aiming, launching, rocket propelled grenade or equivalent.

(h) If a PCASP opens fire the RUF should explain that only:

(i) Aimed shots should be fired to stop the attack;

(ii) No more rounds than are necessary should be fired in

¹²⁸ *Id.* at 4.

order to stop the attack; and

(iii) All precautions should be taken not to injure anyone other than the targeted person.¹²⁹

The standard contract itself (aside from the guidelines which were just discussed) for the employment of security guards on vessels suggests a minimum number of four guards on board a ship.¹³⁰ Why this number? Because it has "been proven to give the best protection against attack because all quarters of the ship can be covered and a proper around-the-clock watch system can be maintained."¹³¹

The content of the rules for the use of force is a matter of national law, so it is obvious that there must be concurrent jurisdiction between that of the flag vessel and that of the state from which the Pirates came.¹³² However, if an attack occurs in international waters, there will be universal jurisdiction as the piracy articles of the UNCLOS go into effect.¹³³ Those articles call for the arrest of any pirates on the high seas who are aboard a private vessel attacking another ship.¹³⁴

According to the GUARDCON contract, "there is no established 'best industry practice' in the maritime security sector as yet" so contractors must "use 'all reasonable skill and care' as the benchmark for providing the agreed security services."¹³⁵ The contract points out that the guards are listed as "supernumeraries" on board the vessel in order to avoid issues in certain ports as to the status of non-crew on the ship.¹³⁶ If they were not listed as supernumeraries, they might be considered passengers, which could raise issues regarding their employment on board and the character of their security equipment.¹³⁷

An interesting aspect of the contract is under section four regarding the Master's authority and the division of

¹²⁹ *Id.* at 5.

¹³⁰ *GUARDCON Standard Contract*, *supra* note 109, at 4.

¹³¹ *Id.* at 1.

¹³² *See id.* at 2.

¹³³ *See UNCLOS*, *supra* note 81, arts. 100-107.

¹³⁴ *Id.* art. 105.

¹³⁵ *GUARDCON Standard Contract*, *supra* note 109, at 4.

¹³⁶ *Id.* at 6.

¹³⁷ *Id.*

responsibilities in a hijacking. The GUARDCON contract notes that the “concept of providing the use of force, including lethal force, in a *commercial* contract is unique in the maritime field.”¹³⁸ At the moment, the maritime security industry does not have the same level of security and level of transparency called for in most countries for the use of force by the police.¹³⁹ The Master of a merchant vessel does not have the necessary expertise to command a team of armed guards in the use of firearms, so the Master must set aside his judgment when a decision has to be made about opening fire on the pirates.¹⁴⁰ The contract raises the question of whether the rules of engagement may be made effective from the point at which the guards embark the vessel until the end of the transit, because this would avoid any decision-making about who invokes the rules and when.¹⁴¹ In BIMCO’s view,

[T]he concept of effectively giving weapons control to the security guards while the vessel is within the territorial waters of a Coastal State would create many more legal and practical issues than it resolved. . . . However, experience of Somali piracy attacks indicate that with vigilant bridge and security teams there is always forewarning of an attack and therefore there should always be time for the guards to make the bridge team aware of their intentions.¹⁴²

The guidance reinforces the importance of employing a graduated and proportional response to a threat.¹⁴³ The Master cannot order a guard to shoot because the decision is allocated to each of the security guards alone.¹⁴⁴ It is thought that the Master is unlikely to be exposed to any criminal action at a later date if the private security guards make the legal decision.¹⁴⁵ However, the Master does retain the right under all circumstances to order the

¹³⁸ *Id.* (emphasis added).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 6.

¹⁴¹ *GUARDCON Standard Contract*, *supra* note 109, at 7.

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7.

guards to stop firing.¹⁴⁶

The IMO is very much concerned with the fact that the PMSC have awareness and understanding of the applicable laws of flag, port, and coastal states with respect to transport, carriage, storage, the use of firearms and security-related equipment, and the use of force.¹⁴⁷ The IMO issued a "Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel On Board Ships," which is included as an annex to this Article so that the reader can see questions regarding the entry of ships into ports, anchorages, roadstead or off-shore terminals when carrying firearms and/or security-related equipment and/or PCASP.¹⁴⁸ Among others inquiries, the questionnaire asks if specific notification is required from ships intending to enter or depart from ports.¹⁴⁹ There are two sample responses in the annex, one by the government of Australia and one by the government of Denmark.¹⁵⁰ The questionnaire sets forth the entry requirements that the shipowner should consider when entering a port regarding the carrying of firearms on board ships, security-related equipment, a place for ships carrying firearms when transiting through the territorial waters of contiguous states, such as Australia or Denmark, allowing of embarkation and disembarkation of firearms, equipment in their ports, and the relevant requirements where there is import or

¹⁴⁶ *Id.*

¹⁴⁷ IMO Interim Guidance for PCASP, *supra* note 80, Annex, at 3. There is a large section seven in the contract entitled "Legal and Liabilities." However, this is more in line with a discussion of indemnification in case of negligence by the security contractors. Compare *GUARDCON Standard Contract*, *supra* note 109, at 10-11 (discussing the contractors' indemnity), with IMO Interim Guidance for PCASP, *supra* note 80, Annex, at 3 (noting PMSC should understand all applicable laws).

¹⁴⁸ See IMO, *Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships*, MSC-FAL.1/Circ.2 (Sept. 22, 2011) [hereinafter *Questionnaire on Information on Port and Coastal State Requirements*].

¹⁴⁹ *Id.*, Annex, at 1.

¹⁵⁰ See IMO, *Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships: Denmark*; IMO, *Response by the Government of Australia to MSC-FLL.1/Circ.2 of 22 September 2011: Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships* (published in Annex, *infra* p. 130) (on file with N.C. J. Int'l L. & Com. Reg.).

arrival and/or export or departure from their territory of firearms and/or security-related equipment for use by PCASP.¹⁵¹

Shipowners navigate a challenging range of legal considerations when establishing their counter-piracy measures because of the absence of formal updates to applicable international regulations, complex industry self-regulation, and the disparate national laws and standards regarding the use of armed guards and the presence of weapons on board ships.¹⁵² Many nations, following the IMO interim guidance and industry guidelines, are adopting national laws to clarify the legal ramifications of counter-piracy measures.¹⁵³ Although progress has been made, the international rules and national laws are still far from being harmonized and many State prohibitions against the presence of PCASP and weapons still exist.¹⁵⁴ Nevertheless, shipowners increasingly rely on PCASP to protect their vessels from pirates and the effectiveness of PCASP is being validated by the reduction in incidents of piracy.¹⁵⁵

V. Human Rights Considerations on the Use of PCASP

Whether the Montreux Document on Munition Pertinent International Legal Obligations Good Practices (GP) for States related to Operations, Private, Military and Security Companies during Armed Conflict applies to the use of PCASP on merchant ships has been raised as a legal issue by many concerned about the potential for human rights violations in the conflicts between armed guards and pirates at sea.¹⁵⁶ The IMO considers the

¹⁵¹ *Questionnaire on Information on Port and Coastal State Requirements*, *supra* note 148, Annex, at 1-3.

¹⁵² IMO Circular 1405, *supra* note 116, Annex, at 1.

¹⁵³ See AMBOS NBGO, *supra* note 106 (describing a new Belgian law for ships sailing under the Belgian flag).

¹⁵⁴ See Matteo Crippa, *Privately Contracted Armed Security Personnel and Counter-Piracy: Is France at a Turning Point?*, COMMUNIS HOSTIS OMNIUM (Apr. 17, 2012), <http://piracy-law.com/2012/04/17/privately-contracted-armed-security-personnel-and-counter-piracy-is-france-at-a-turning-point/> (stating that there is no consensus among European states and the United States about the use of PCASP on merchant ships and that France, among others, opposes their use).

¹⁵⁵ *Protecting Ships from Somali Pirates—The Navy vs. Private Security*, *supra* note 72.

¹⁵⁶ IMO Interim Guidance for PCASP, *supra* note 80, Annex, at 2.

International Code of Conduct for private security service providers (ICoC) to provide “useful reference points” for the PMSC, but notes that the ICoC “[is] not directly relevant to the situation of piracy and armed robbery in the maritime domain and do[es] not provide sufficient guidance for PMSC.”¹⁵⁷ The ICoC sets forth a set of principles for private security companies and the Montreux Document reaffirms the obligation of States to ensure that private military and security companies operating in armed conflicts comply with the international humanitarian and human rights requirements.¹⁵⁸ However, the IMO considers both of these documents inapplicable because, in the case of the Montreux Document, it applies only during “armed conflict,” and in the case of the ICoC, it only

identifies a set of principles and processes for private security service providers related to support for the rule of law and respect for human rights, but is written in the context of self-regulation and only for land-based security companies, and is therefore not directly applicable to the peculiarities of deploying armed guards on-board merchant ships to protect against acts of piracy and armed robbery at sea.¹⁵⁹

At least one scholar has taken serious issue with this view of whether the document applies to “armed conflict.”¹⁶⁰ The argument set forth in his article is that there have been “serious concerns that over ‘frequent reports of security contractors’ impunity for . . . human right abuses, criminal conduct or aggressive behavior.’”¹⁶¹ The article also asserts that the “chief objection shared by the IMO and the IMB is the fear that the placement of PMSC personnel aboard commercial vessels will escalate the level of violence pirates employ when attempting to take a ship.”¹⁶² The efforts of the international maritime industry

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Joel Christopher Coito, *Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden*, 101 CAL. L. REV. 173, 174 (2013).

¹⁶¹ *Id.* at 177 (quoting E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L L.J. 221, 221 (2008)).

¹⁶² *Id.* at 181-82 (citing Katharine Houreld, *AP IMPACT: Security Firms Join*

to address the increasing losses from piracy since 2009, the implementation of the counter-piracy actions described above, and the accelerated correlated shifts in the piracy statistics have largely displaced the views expressed in the article.¹⁶³ In fact, in April 2013, IMB Director Pottengal Mukundan expressly advised that merchant vessels should not “relax their vigilance,” which includes utilizing PCASP and other counter-piracy protective measures, otherwise the problem may resurface.¹⁶⁴

In addition, it is quite obvious that the IMO has set forth rules of engagement and has clearly enunciated them in order to make certain that the contracts between ship owners and security guards take into account not only the risk assessments but also the graduated use of force against pirates so that such situations can be avoided.¹⁶⁵ A representative of an oil company predicted that “the use of armed guards is likely to lead to significant increased risk of personal-injury, fire and explosion, [and] risk of escalation of conflict, particularly as Pirates will assume all vessels are armed and attack tempo will increase accordingly”¹⁶⁶ However, that has not proven to be the case.¹⁶⁷ Yes, occasionally a fishing skiff is fired upon, but there has been no marked increase in or tactical escalation of violence.¹⁶⁸ *In fact, pirate attacks on merchant vessels have diminished significantly.*¹⁶⁹ The predicted increase in

Somali Piracy Fight, USA TODAY (Oct. 26, 2008), http://usatoday30.usatoday.com/news/world/2008-10-26-2583935117_x.htm). However, the IMB serves an important role as the self-declared “world’s premier independent crime-fighting watchdog for international trade.” *Int’l Crime Services*, INT’L MARITIME BUREAU, <http://www.icc-ccs.org/icc/imb>. See also *IMB Advises Continued Vigilance as Maritime Piracy Attacks Decline*, *supra* note 55.

¹⁶³ Compare Coito, *supra* note 160, at 174, 177 (quoting and citing articles from 2008 to glean the stance of the IMB and IMO on maritime use of PMSC by merchants), with IMO Interim Guidance for PCASP, *supra* note 80.

¹⁶⁴ *IMB Advises Continued Vigilance as Maritime Piracy Attacks Decline*, *supra* note 55.

¹⁶⁵ See generally IMO Interim Guidance for PCASP, *supra* note 80.

¹⁶⁶ Coito, *supra* note 160, at 183.

¹⁶⁷ See generally *The Economic Cost of Somali Piracy 2012*, *supra* note 8.

¹⁶⁸ See discussion above regarding the drop in piracy attacks from 2011 through the first quarter of 2013. *IMB Piracy Report 2013*, *supra* note 49; *IMB Piracy Report 2012*, *supra* note 44.

¹⁶⁹ Sunil K. Vaidya, *Piracy Incidents Decline in Gulf of Aden*, GULF NEWS (Oct. 4, 2012), <http://gulfnews.com/news/gulf/oman/piracy-incidents-decline-in-gulf-of-aden-1.1085059>; Jim Michaels, *Somali Pirate Attacks Plummet*, USA TODAY (Dec. 20, 2012,

the frequency of attacks has not really occurred.¹⁷⁰

While the problem of overbearance against pirates by security guards has not really been seen in newspapers or elsewhere, one answer to the concern that using PMSC will escalate the intensity of armed conflicts is that the types of weapons that the pirates use already include rocket launchers, automatic weapons, rifles, and pistols.¹⁷¹ These are supplied by their financial backers.¹⁷²

The main purpose of the Montreux Document in 2008 was to address the responsibilities of States contracting with PMSC in territorial armed conflicts.¹⁷³ The original document “does not specifically mention or address employment of PMSC’s on ships.”¹⁷⁴ In August 2009, the International Committee for the Red Cross (ICRC) released a new publication of the Montreux Document with a foreword and annex that officially explain and dispel some of the enigmatic interpretations and misconceptions about its applicability.¹⁷⁵ The ICRC first clarified that “[n]either NGOs nor companies can join the Montreux Document officially (as it is the outcome of an initiative primarily aimed at recalling State responsibility), but they are encouraged to use it as a reference in their own relations with PMSCs.”¹⁷⁶ Then, the ICRC specifically addressed the applicability to PMSC on merchant vessels:

The Montreux Document, in line with international humanitarian law, was written bearing in mind that PMSCs operate in an armed conflict environment. However, it is also meant to provide practical guidance in other contexts (see paragraph 5 of its preface). A current example is the contracting of PMSCs to protect merchant shipping against acts of piracy. Even if fighting piracy is best understood as a matter of law

6:57 PM), <http://www.usatoday.com/story/news/world/2012/12/20/piracy-somalia/1781929/>.

¹⁷⁰ Vaidya, *supra* note 169; Michaels, *supra* note 169.

¹⁷¹ *Escalation at Sea: Somali Piracy and Private Security Companies*, SMALL ARMS SURVEY 2012, <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2012/eng/Small-Arms-Survey-2012-Chapter-6-summary-EN.pdf>.

¹⁷² See Dubner & Raturi, *supra* note 2, at 5.

¹⁷³ Montreux Document, *supra* note 6, at 5-6.

¹⁷⁴ Coito, *supra* note 160, at 196.

¹⁷⁵ Montreux Document *supra* note 6, at 4.

¹⁷⁶ *Id.* at 4.

enforcement (and not of armed conflict), the Montreux Document's statements on jurisdiction remain pertinent reading.¹⁷⁷

The Montreux Document acknowledges that it is a legally nonbinding document, even to the signatory nations.¹⁷⁸ The most realistic current "view of governments engaged in counter-piracy activity is that they are performing a law-enforcement operation to which the international law of human rights has little application."¹⁷⁹ Thus, it is the current and changing national laws governing PMSC (for example in countries like Belgium and Greece where recent enactments aim to regulate the use of PMSC on shipping vessels) that will continue to provide the legal human rights obligations of the PMSC and their merchant ships.

However, in looking at the IMO guidance documents as well as the guidance documents of private contractors, it is obvious that they are extremely concerned with the human rights of everybody involved.¹⁸⁰ Otherwise, they would not have taken pains to set forth risk assessments, gradual nonviolence, and graduated violent reactions to certain types of pirate situations. As of October 4, 2012, there had been no successful attacks against merchant ships carrying armed guards on board their vessels.¹⁸¹ It seems the financial backers have decided that it is not worthwhile to fund this type of piracy off the coast of Somalia.¹⁸²

As one scholar notes, "a recent update from the military provided an interesting breakdown of statistics that have been disclosed by the 80% of ships" transiting the East African coast that are registered with the Maritime Security Centre—Horn of Africa (MSCHOA) and have completed the comprehensive registration form.¹⁸³ "In general terms, of the 80% of the transiting

¹⁷⁷ *Id.* at 39.

¹⁷⁸ *Id.* at 9.

¹⁷⁹ Coito, *supra* note 160, at 208.

¹⁸⁰ *See, e.g.*, IMO Interim Guidance for PCASP, *supra* note 80.

¹⁸¹ Vaidya, *supra* note 169.

¹⁸² *See Somali Piracy: More Sophisticated Than You Thought*, THE ECONOMIST (Nov. 2, 2013), <http://www.economist.com/news/middle-east-and-africa/21588942-new-study-reveals-how-somali-piracy-financed-more-sophisticated-you>; Abdi Guled & Jason Straziuso, *For Somali Pirates, Party Seems to be Over*, TWIN CITIES PIONEER (Sep. 12, 2012), http://www.twincities.com/ci_21655783/somali-pirates-party-seems-be-over.

¹⁸³ Stephen Askins, *Herd Immunity*, INCE & CO (Mar. 15, 2013),

ships: 65% of vessels have a citadel, 35% have armed guards, 3% use the Group Transit Scheme (GTS) in the Gulf of Aden, and something less than that follow a convoy.”¹⁸⁴

Interestingly, the citadel and armed guards figures have held steady over the past six months, despite the perception that the threat has decreased markedly. There are, of course, some unknowns here in the sense that the non-registering 20% of ships may have all been carrying armed guards and now don't. . . .¹⁸⁵

The interim guidance and recommendations provided by the IMO are not intended to endorse or institutionalize the use of armed guards.¹⁸⁶ Therefore, they do not represent any fundamental change in policy by the IMO in this regard. It is for each Flag State, individually, to decide whether or not PCASP should be authorized for use on-board ships flying their flag.¹⁸⁷ If a Flag State decides to permit this practice, then it is up to that State to determine the conditions under which authorization will be granted.¹⁸⁸

One article questioning the humanitarian treatment of pirates by PMSC starts with the example of “[t]he first recorded death of a pirate at the hands of [PMSC]” on the Panamanian-flagged Motor Vessel *Almezaan* in March of 2010, which occurred in response to pirates initiating an attack on the vessel with AK-47s.¹⁸⁹ While the loss of human life is always tragic, the *Almezaan* incident was clearly “self-defense” of the merchant vessel and, additionally, the response and capture of the pirates was coordinated with military forces of the EU.¹⁹⁰ Contrast the human rights implications of the 2010 conflict with the following tragic piracy attack that finally concluded in 2012:

<http://incelaw.com/ourpeople/stephen-askins/blog/herd-immunity>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See IMO Interim Guidance for PCASP, *supra* note 80, Annex, at 6 (“An armed team should only be seen as a supplement to full BMP implementation and in no way replaces the need for BMP to be implemented.”).

¹⁸⁷ See UNCLOS, *supra* note 81, arts. 91, 92.

¹⁸⁸ *Id.*

¹⁸⁹ Coito, *supra* note 160, at 176. A European Union (EU) helicopter detained the six out of seven pirates who were not killed. *Id.*

¹⁹⁰ See *id.*

Until recently, the longest ongoing hijacking and ransom incident was the now infamous *Iceberg I*. The Panama-flagged RO/RO vessel and its 24 member crew were hijacked in March of 2010. Over the course of their nearly 3 years in captivity, the crew was reported to have suffered severe psychological and physical abuse. One crew member was also said to have committed suicide by jumping overboard in October of 2010. The remaining crew members and the vessel were freed in late December 2012 following a rescue operation launched by Puntland's Maritime Police Force.¹⁹¹

There are humanitarian concerns with every incident of piracy and counter-piracy, but the defensive measures, and graduated responses, employed by the PMSC on merchant ships are likely preferable to the alternative.

VI. Conclusion

The main practical problems with employing PCASP on ships are whether or not the private security guards are employing undue force and whether they are effective in controlling acts of piracy. The immense reduction in piracy off the coast of Somalia indicates that PCASP are having a positive impact in eliminating the piracy problems and reducing the risks of transit in the area.¹⁹² Although some incidents and critics of PCASP raise the issue of human rights, the applicable national laws in an encounter, the international guidance on the use of PCASP, and the industry BMP emphasize the importance of using nonviolent measures in addition to armed guards and ensuring the use of force is graduated and proportional.

This Article began with the hypothetical scenario of security guards opening fire and destroying a suspicious skiff/ship, killing the pirates on-board, and then subsequently finding that it had been a "legitimate" fishing vessel. This scenario raised the question of whether the security guards and/or ship captain could be held legally responsible for the deaths and destruction. The answer is yes, but the more fundamental question is not whether they are responsible, but rather who will assume jurisdiction.¹⁹³

¹⁹¹ *The Economic Cost of Somali Piracy 2012*, *supra* note 8, at 12.

¹⁹² Vaidya, *supra* note 169; Michaels, *supra* note 169.

¹⁹³ One problem with assessing the question of jurisdiction is that it is likely that no one will know about incidents at sea other than the security guards and the master of the

The IMO and IMB have taken pains to set forth guidance for the use of force on board a merchant vessel as a counter-piracy measure. They have shown that it is necessary to make a risk assessment, a sample of which is set forth in the IMO information circulars.¹⁹⁴ It is necessary to have rules for the use of force, which the IMO has also set forth. It has also been shown that various states have regulations regarding carrying guns aboard ships while in port or in transit through their territorial waters. Other states do not.¹⁹⁵ There is a myriad of possibilities regarding legal problems, but they tend to be overlooked because of the unexpectedly high success rate that the private security guards have brought to merchant vessels traveling through perilous waters off the coast of Somalia.¹⁹⁶ One can ask whether it is truly worth the cost when there is such a potential for the use of excessive force. On the other hand, the hostages that have been held captive, sometimes for years, in different parts of Somalia, and their families, would likely say that it is more than worth the cost. This Article has set forth the potential responsibilities and legal obligations, but the question remains whether the rules of engagement will be properly observed.

ship, possibly the crew as well. It is difficult to impose accountability on the unknown, although, there have been instances where a fishing vessel was destroyed and it was made known. *See, e.g.,* Naqvi, *supra* note 75.

¹⁹⁴ IMO Circular 1405, *supra* note 116.

¹⁹⁵ *See Piracy and Private Security: Laws and Guns*, THE ECONOMIST (Apr. 14, 2012), <http://www.economist.com/node/21552553>.

¹⁹⁶ Vaidya, *supra* note 169; Michaels, *supra* note 169.

VII. Appendix

Sample Responses By:

Denmark

Australia

For: IMO, Questionnaire On Information On Port And Coastal State Requirements Related To Privately Contracted Armed Security Personnel On Board Ships, MSC-FAL.1/Circ.2 (Sept. 22, 2011).

QUESTIONNAIRE ON INFORMATION ON PORT AND COASTAL STATE REQUIREMENTS RELATED TO PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL ON BOARD SHIPS (MSC-FAL.1/Circ.2)

1. Requirements regarding ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals when carrying firearms and/or security-related equipment and/or PCASP

1.1 Do you require specific notification from ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

See answer for question 1.2.

AUSTRALIA:

Yes. A range of Australian Government agencies require information prior to, and at, entry and departure, including the Australian Customs and Border Protection Service, the Department of Immigration and Citizenship, and the Australian Maritime Safety Authority, amongst others. Ships are also subject to requirements under applicable international conventions to which Australia is a signatory. Information required by these agencies may include details on arrival and departure of all personnel, crew, firearms, weapons and other security-related equipment.

1.2 Do you require information regarding flag State authorization for use of PCASP and/or the firearms and/or the security-related equipment for use by the PCASP from ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

According to Section 1 of the Weapons and Explosives Act firearms and ammunition may not be imported into Danish territory without a license or authorization from the Ministry of Justice or the police.

According to Section 2 of the Weapons and Explosives Act possession of firearms and ammunition requires a license or authorization from the Ministry of Justice.

According to Section 6 of the act a license or authorization is also required for exporting firearms, ammunition and equipment for warfare out of Danish territory. The issuing of an export license requires among other things certain documentation, including an import license, or a declaration from the regulatory authority in the recipient country to the effect that it has no objection to the issuing of an export license.

AUSTRALIA:

Yes, information regarding authorisation may be required under certain circumstances. For example, if export permission of firearms is required, information on the flag state must be provided as part of the address details of the consignor in its application to the Defence Export Control Office.

1.3 Do you require specific notification regarding firearms for use by the PCASP carried on board ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

See answer for question 1.2.

AUSTRALIA:

Yes, notification may form part of the information required by Australian Government agencies. For example, the Australian Customs and Border Protection Service may require specific details of firearms, ammunition and related equipment, as well as justification for carriage.

1.4 Do you require specific notification regarding security-related equipment for use by the PCASP carried on board ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

No, only if the security-related equipment is designed for warfare.

AUSTRALIA:

Yes, notification may form part of the information required by Australian Government agencies. For example, the Australian Customs and Border Protection Service may require specific details of firearms, ammunition and related equipment, as well as justification for carriage.

1.5 Do you require specific notification regarding PCASP carried on board ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

No.

AUSTRALIA:

Notification may form part of the information required by Australian Government agencies. For example, PCASP are required to hold an appropriate visa (for example, a maritime crew visa, transit visa, visitor visa, business (short stay) visa, or temporary business (long stay) visa), and meet all the entry, departure and notification conditions attached to that visa.

1.6 What requirements, if any, do you have in place for ships carrying firearms and/or the security-related equipment for use by the PCASP or PGASP when transiting through your territorial seas and/or contiguous zones before arrival in or after departure from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

A transit is considered to be an import followed by an export. See answer for question 1.2.

AUSTRALIA:

Obligations (for example, for notification, authorisation or storage) may be imposed by a number of Australian Government agencies, including the Australian Customs and Border Protection Service and the Defence Export Control Office. Notification is often required in advance, and should be provided directly to the relevant agency.

2 Requirements regarding ships intending to enter in or depart from your ports, anchorages, roadstead or offshore terminals for the purpose of embarking or disembarking firearms and/or security-related equipment and/or PCASP.

2.1 Do you allow the embarkation or disembarkation of firearms and/or the security-related equipment for use by the PCASP or of PGASP in your ports, anchorages, roadstead or offshore terminals or elsewhere in your territorial sea(s)?

DENMARK:

See answer for question 1.2.

AUSTRALIA:

It is a criminal offence for a person to have a weapon in their possession in a maritime security zone without authorisation or written permission by relevant Australian Government agencies.

The embarkation/disembarkation of firearms and/or security related equipment is treated as the importation/exportation of goods, and is subject to all applicable Australian laws (including

State and Territory laws) in this regard. Further information can be obtained from the Australian Customs and Border Protection Service, the Defence Export Control Office, and other relevant agencies as required.

2.2 Do you require information regarding flag State authorization for use of PCASP and/or the firearms and/or the security-related equipment for use by the PCASP from ships intending to enter in or depart from your ports for the purpose of embarking or disembarking firearms and/or the security-related equipment for use by the PCASP or PCASP?

DENMARK:

See answer for question 1.2.

AUSTRALIA:

Yes. A range of Australian Government agencies require information prior to, and at, entry and departure at Australian ports. Information regarding authorisation may be required under certain circumstances. The embarkation/disembarkation of firearms and/or security related equipment is treated as the importation/exportation of goods, and is subject to all applicable Australian laws (including State and Territory laws) in this regard. Further information can be obtained from the Australian Customs and Border Protection Service, the Defence Export Control Office and other relevant agencies as required.

2.3 What requirements, if any, do you have in place in connection with the import or arrival in and/or export or departure from your territory of firearms and/or security-related equipment for use by PCASP?

DENMARK:

See answer for question 1.2.

AUSTRALIA:

The importation/exportation of firearms and/or security-related equipment to and from Australia is governed by a number of Australian laws, including the Customs (Prohibited Imports)

Regulations 1956. Australian State or Territory laws may also be applicable. Applications for import/export are often required in advance, and can be made directly to the relevant department.

2.4 What requirements, if any, do you have in place in connection with the storage, security or control of the firearms and/or security-related equipment for use by the PGASP prior to their embarkation or after their disembarkation?

DENMARK:

Firearms and ammunition when in Denmark must be stored responsibly and where there is no access for unauthorized persons according to Section 21 of the Government Order on Weapons and Ammunition. Firearms must also be stored in a secure cabinet for weapons.

AUSTRALIA:

Storage and control of firearms and security-related equipment is subject to a range of security and safety regulations. Possession and storage requirements are potentially subject to both Commonwealth and State and Territory legislation. Advice should be sought directly from the relevant Commonwealth and State and Territory agencies, including the Australian Customs and Border Protection Service.

2.5 What requirements, if any, do you have in place in connection with the storage, security or control of the firearms and/or security-related equipment carried on board for use by the PCASP after their embarkation or prior to their disembarkation, when the ship is in your port, anchorage, roadstead or territorial waters?

DENMARK:

If the local police suspects an infringement of the storage rules they can conduct a search of the premises where the weapons are stored.

AUSTRALIA:

Storage and control of firearms and security-related equipment is subject to a range of security and safety regulations. Possession and storage requirements are potentially subject to both Commonwealth and State and Territory legislation. Advice should be sought directly from the relevant Commonwealth and State and Territory agencies, including the Australian Customs and Border Protection Service.

2.6 What requirements, if any, do you have in place for ships carrying firearms and/or the security-related equipment for use by the PCASP or of PGASP (which they have embarked your anchorages, roadstead or offshore terminals) when transiting through your territorial seas and/or contiguous zones after departure from your ports, anchorages, roadstead or offshore terminals?

DENMARK:

See answer for question 2.5.

AUSTRALIA:

A range of security and safety regulations may apply. For example, vessels departing from ports and remaining in Australian territorial waters may be subject to ongoing Commonwealth and State and Territory requirements in relation to the storage, security or licensing of firearms and/or security-related equipment.

3 Reporting of security-related incidents in territorial seas.

3.1 What do you consider to constitute a security incident in your territorial sea(s)?

DENMARK:

Any suspicious act or circumstance threatening the security of a SOLAS ship, MODU, high-speed craft or port facility.

AUSTRALIA:

Security incidents within Australia's territorial seas are both defined by, and subject to, Commonwealth, and State and Territory legislation. The principal Commonwealth offshore enforcement provisions are contained in the:

- *Customs Act 1901;*
- *Migration Act 1958;*
- *Quarantine Act 1908;*
- *Fisheries Management Act 1991;*
- *Environmental Protection and Biodiversity Conservation Act 1999;*
- *Maritime Transport and Offshore Facilities Security Act 2003;*
- *Defence Act 1903 (Offshore Division - Part 111AAA);*
- *Crimes Act 1914; and or Crimes (Ships and Fixed Platforms) Act 1992.*

A number of other Acts also deal with enforcement, management and regulation of activities within Australia's maritime domain. Various, and sometimes differing, State and Territory laws also apply within to the territorial seas and would need to be considered in defining a security incident.

3.2 Do you require information regarding security-related incidents occurring in your territorial sea(s)?**DENMARK:**

Dependent on the nature of the incident, the Master or PFSO shall decide on whether to report it to the local police.

AUSTRALIA:

Yes. A number of Commonwealth, State and Territory laws and regulations, including the Maritime Transport and Offshore Facilities Security Act 2003, require the reporting of security-related incidents.